

1 UNITED STATES BANKRUPTCY COURT

2 DISTRICT OF NEVADA

3 LAS VEGAS, NEVADA

4 In re: USA COMMERCIAL MORTGAGE) JANUARY 31, 2007
5 COMPANY,) E-Filed: 03/18/07
6 Debtor.) Case No.
7) BK-S-06-10725-LBR
8) Chapter 11

8 PARTIAL TRANSCRIPT OF PROCEEDINGS
9 OF
10 (06-10725) MOTION TO ENFORCE ORDER
11 GRANTING DEBTOR'S MOTION TO DISTRIBUTE FUNDS, 2350
12 AND

13 OMNIBUS OBJECTION TO CLAIM OF
14 IN THE AMOUNT OF CLAIMS ON EQUITY
15 MISFILED AS CREDITOR CLAIMS, NO. 2353
16 AND
17 OBJECTION TO CLAIM 79
18 OF PENSION BENEFIT GUARANTY CORPORATION
19 IN THE AMOUNT OF \$884,389,
20 CLAIM 80 OF PENSION BENEFIT GUARANTY CORPORATION
21 IN THE AMOUNT OF 1,068,233,4
22 AND CLAIM 81 OF PENSION BENEFIT GUARANTY CORPORATION,
23 NO. 2252

24 AND
25 OBJECTION TO CLAIM 83
OF PENSION BENEFIT GUARANTY CORPORATION
IN THE AMOUNT OF \$884,389,
CLAIM 84 OF PENSION BENEFIT GUARANTY CORPORATION
IN THE AMOUNT OF \$1,068,233,
AND CLAIM 85 OF PENSION BENEFIT GUARANTY CORPORATION,
NO. 2255

AND
APPLICATION FOR COMPENSATION, NO. 2316
AND

26 Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 OMNIBUS OBJECTION TO CLAIM OF
2 IN THE AMOUNT OF MISFILED
3 AGAINST USA CAPITAL FIRST TRUST DEED FUND, LLC,
4 BY DANIEL O. CARLTON & TAKEKO CARLTON REVOCABLE TRUST
5 DATED 04/30/97, CLAIM NO. 43;
6 DANIEL O. CARLTON & TAKEKO CARLTON REVOCABLE TRUST
7 DATED 04/30/97, CLAIM NO. 44;
8 DANIEL O. CARLTON & TAKEKO CARLTON REVOCABLE TRUST
9 DATED 04/30/97, CLAIM NO. 45;
10 DANIEL O. CARLTON & TAKEKO CARLTON REVOCABLE TRUST
11 DATED 04/30/97, CLAIM NO. 46;
12 DANIEL O. CARLTON & TAKEKO CARLTON REVOCABLE TRUST
13 DATED 04/30/97, CLAIM NO. 49;
14 LAWRENCE J. ARONSON & HENRIETTA ARONSON, CLAIM NO. 50;
15 MOLLIE SHOICHET & HENRIETTA ARONSON, CLAIM NO. 51;
16 BUCKWALD REVOCABLE TRUST DATED 02/11/92, CLAIM NO. 52;
17 PHILLIP DARIN GOFORTH & FRANCESCA M. GOFORTH, CLAIM NO. 54;
18 MELINDA ESTEVEZ & RICHARD DAVID ESTEVEZ,
19 ACCT. NO. 2, CLAIM NO. 57;
20 MELINDA ESTEVEZ & RICHARD DAVID ESTEVEZ,
21 ACCT. NO. 1, CLAIM NO. 58;
22 MELINDA ESTEVEZ & RICHARD DAVID ESTEVEZ,
23 ACCT. NO. 3, CLAIM NO. 59;
24 THE EVO E. ZEPPONI AND BILLIE D. ZEPPONI FAMILY TRUST
25 UNDER AGREEMENT DATED 02/09/83, CLAIM NO. 60;
IONA PETE BAKAS HALLIDAY, CLAIM NO. 61;
LAUREN J. GILBERT & ERIN M. GILBERT, CLAIM NO. 62;
LAUREN J. GILBERT, CLAIM NO. 63;
MICHAEL W. CARLTON & HELEN I. CARLTON, CLAIM NO. 67;
SONDRA SKIPWORTH REVOCABLE TRUST DATED 11/28/01,
CLAIM NO. 74;
DONNOLO FAMILY TRUST DATED 08/24/88,
JOSEPH & LORETTA DONNOLO, TRUSTEES, CLAIM NO. 75;
RICHARD L. YOUNGE IRA, CLAIM NO. 76;
EDWIN C. HANSEN & RACHEL M. HANSEN, CLAIM NO. 78;
CENTER STATE BEVERAGE, INC., CLAIM NO. 79;
LAYNE FAMILY TRUST, BRUCE & SHERRY LAYNE, CLAIM NO. 81;
KAREN PETERSEN TYNDALL TRUST DATED 03/09/94, CLAIM NO. 86;
KPT IRREVOCABLE TRUST DATED 07/16/99, CLAIM NO. 87;
KPT IRREVOCABLE TRUST DATED 07/16/99, CLAIM NO. 88;
ROBERT CAROLLO AND BEVERLEY CAROLLO, CLAIM NO. 92;
ARNOLD ROSENTHAL, CLAIM NO. 93;
VICTORIA SMITH, CLAIM NO. 95;
L. KANANI COHUME, CLAIM NO. 101;
MICHAEL BAGINSKI, CLAIM NO. 113;
KAREN PETERSEN TYNDALL TRUST DATED 03/09/94, CLAIM NO. 116;
KPT IRREVOCABLE TRUST DATED 07/16/99, CLAIM NO. 117;
JAMES J. LEE, ESQ., CLAIM NO. 121;
JAMES J. LEE, CLAIM NO. 122;
WILLIAM CHAD BERRY, CLAIM NO. 126;

1 RDJ INVESTMENTS, CLAIM NO. 130;
2 RICHARD N. ANDERSON TTE,
3 RICHARD N. ANDERSON SEPARATE PROPERTY, CLAIM NO. 131;
4 CRAIG ZAGER SEP IRA, CLAIM NO. 132;
5 CURTIS R. & TERRI L. COLAGROSS, CLAIM NO. 139
6 NO. 2286
7 AND
8 OBJECTION TO CLAIM 120
9 OF STANDARD PROPERTY DEVELOPMENT, LLC,
10 IN THE AMOUNT OF, NO. 2299
11 AND
12 OMNIBUS OBJECTION TO CLAIM 115 OF BRIAN M. ADAMS
13 IN THE AMOUNT OF;
14 CLAIM 118 OF HERMAN M. ADAMS;
15 CLAIM 118 OF BRIAN ANTHONY G. ADAMS;
16 CLAIM 118 OF ANTHONY G. ADAMS OLYMPIA CAPITAL MANAGEMENT,
17 CLAIM 119;
18 KANTOR NEPHROLOGY CONSULTANTS, LTD, 401(K) PSP,
19 GARY KANTOR, TRUSTEE, CLAIM 123;
20 DR. GARY KANTOR, CLAIM 124;
21 LYNN M. KANTOR, CLAIM 125, NO. 2301
22 AND
23 MOTION FOR PROTECTIVE ORDER, NO. 2441
24 AND
25 OBJECTION TO CLAIM 819 OF SPECTRUM FINANCIAL
IN THE AMOUNT OF \$49,581
AND CLAIM 821 OF ROLLAND P. WEDDELL
IN THE AMOUNT OF \$13,081, NO. 2067
AND
ORDER SHORTENING TIME
RE: APPLICATION TO EMPLOY
DIAMOND, McCARTHY, TAYLOR, FINLEY & LEE, LLP,
AS SPECIAL LITIGATION COUNSEL APPLICATION
PURSUANT TO FEDERAL RULES OF BANKRUPTCY PROCEDURE 2014(A)
FOR ORDER UNDER SECTION 1103 OF THE BANKRUPTCY CODE
AUTHORIZING THE EMPLOYMENT AND RETENTION
OF DIAMOND, McCARTHY, TAYLOR, FINLEY & LEE, LLP,
AS SPECIAL LITIGATION COUNSEL
TO THE OFFICIAL UNSECURED CREDITORS COMMITTEE
FOR USA COMMERCIAL MORTGAGE COMPANY, NO. 2505
AND
HEARING RE: EMPLOYMENT APPLICATION EXTENSIONS (CONT.)
NO. 2402
AND
STATUS HEARING RE: INVOLUNTARY PETITION, NO. 8
AND
ORDER SHORTENING TIME
RE: MOTION TO ENFORCE AUTOMATIC STAY
TO PREVENT FORECLOSURE
BY WESTERN UNITED LIFE ASSURANCE COMPANY, NO. 2561

VOLUME 2
BEFORE THE HONORABLE LINDA B. RIEGLE
UNITED STATES BANKRUPTCY JUDGE

Wednesday, January 31, 2007

9:30 a.m.

Court Recorder: Joanne Lloyd

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 APPEARANCES:

2 For the Debtor and ANNETTE W. JARVIS, ESQ.
3 Debtor in Possession: Ray, Quinney & Nebeker, P.C.
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6 Schwartz & McPherson Law Firm
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7 Suite 1
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8 For the First Trust CANDACE C. CARLYON, ESQ.
9 Deed Committee: Shea & Carlyon, Ltd.
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10 Suite 200
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11 For the Direct GREGORY E. GARMAN, ESQ.
12 Lenders Committee: Gordon & Silver, Ltd.
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13 Ninth Floor
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14 For the Unsecured SUSAN M. FREEMAN, ESQ.
15 Creditors Committee Lewis and Roca, LLP
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16 Mortgage Company: Phoenix, Arizona 85004

17 ALLAN B. DIAMOND, ESQ.
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20 ERIC D. MADDEN, ESQ.
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6 Development, LLC:ANDREW M. BRUMBY, ESQ.
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9 Deed Fund Committee:ANNE M. LORADITCH, ESQ.
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20 and the McGimsey
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23 and Spectrum Financial
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1 APPEARANCES (Cont.):

2 For Project MATTHEW Q. CALLISTER, ESQ.
3 Disbursement Group, Callister & Reynolds
4 Inc.: 823 Las Vegas Boulevard South
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5 For Sondra Skipworth: AARON R. DEAN, ESQ.
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8 For the United States AUGUST B. LANDIS, ESQ.
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13 For John A. Godfrey: JAMES D. GREENE, ESQ.
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17 For Karen Petersen KELLY J. BRINKMAN, ESQ.
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19 (Telephonic)

20 For USA Investment RUSSELL S. WALKER, ESQ.
21 Partners, LLC, and Woodbury, P.C.
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23 For the Trustee: ANTHONY M. ZMAILA, ESQ.
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1 APPEARANCES (Cont.):

2 Also Present: THOMAS J. ALLISON
3 Mesirow Financial Interim
4 Management, LLC
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1 (Court previously convened at 09:38:25 a.m.)

2 (Thereupon, the portion requested to be transcribed
3 commence at 10:09:04 a.m.)

4 THE COURT: And now Ms. Tyndall's.

5 MS. LORADITCH: Ms. Tyndall's claim, there were
6 two claims that arose from her investments as a direct
7 lender, and it was unclear at the time we filed the
8 objection because we didn't have more information from the
9 debtors.

10 Since having gotten that, we conferred with
11 Ms. Tyndall's counsel together with Mesirow Financial, and
12 they confirmed after doing an investigation that those two
13 claims in question were, in fact, arising from her
14 investments as a direct lender and had no connection to
15 Diversified Fund.

16 And so we were asking that those claims 84 and 85 be
17 disallowed in their entirety as well as their duplicates
18 which were claim Nos. 118 and 119.

19 THE COURT: Okay. And, Ms. Brinkman, do you have
20 any comments?

21 MS. BRINKMAN: This is Ms. Brinkman. No. I don't
22 have any comments in light of the Court's ruling --

23 THE COURT: Okay.

24 MS. BRINKMAN: -- on McGimsey.

25 THE COURT: So those objections will be sustained

1 as well.

2 MS. LORADITCH: Thank you.

3 MR. MCGIMSEY: I --

4 THE COURT: Okay.

5 MR. MCGIMSEY: I have one concern --

6 THE COURT: Um-h'm.

7 MR. MCGIMSEY: -- with what counsel just stated.

8 Your Honor indicated to me just at the end that you were
9 ruling that I did not have a creditors claim, and I think
10 that I don't want from what she said for that ruling to
11 change or at least I want to understand it.

12 MS. LORADITCH: I apologize. I don't know what I
13 may have said that was inconsistent with what the Court
14 ruled.

15 THE COURT: I sustained the objection to the
16 claim.

17 MS. LORADITCH: Correct. And we had requested
18 that creditor claims be disallowed that had been filed by
19 equity interest holders --

20 THE COURT: Right.

21 MS. LORADITCH: -- because their claim against
22 Diversified Fund arises from their equity interest, and
23 they'll be distributed on a pro rata basis according to that
24 interest.

25 THE COURT: Right.

1 MR. MCGIMSEY: Well, my concern was, your Honor,
2 is you indicated I was not being subordinated. I did not
3 have a claim, a creditors claim, under 510(b).

4 THE COURT: Under --

5 MS. LORADITCH: I think that's --

6 THE COURT: 510(b) controls. The distribution is
7 in accordance with that, so it's filed as an equity claim
8 and not a creditors claim.

9 MR. MCGIMSEY: I don't have a creditors claim.

10 THE COURT: All right. You don't have a creditors
11 claim.

12 MR. MCGIMSEY: That's --

13 THE COURT: Okay.

14 MR. MCGIMSEY: That's the ruling not that I want.

15 THE COURT: I know. I understand, so you need it
16 for clarity.

17 MR. MCGIMSEY: Yes.

18 THE COURT: I appreciate that.

19 MR. MCGIMSEY: Thank you.

20 MS. LORADITCH: Thank you.

21 THE COURT: Okay. Next, we have the PBGC which
22 has been withdrawn.

23 Then on page 4, we've got Mr. Callister's application
24 for compensation.

25 (Colloquy not on the record.)

1 MR. CALLISTER: Matthew Callister on behalf of
2 PDG, your Honor. Good morning. This is our application
3 under Section 503(b) on behalf of Project Disbursement
4 Group. I'm sure the Court's familiar with --

5 THE COURT: Well, under what --

6 MR. CALLISTER: -- the pleadings.

7 THE COURT: -- under 503(b)?

8 MR. CALLISTER: Well --

9 THE COURT: You never quite told anybody --

10 MR. CALLISTER: -- Under --

11 THE COURT: -- what section --

12 MR. CALLISTER: -- the --

13 THE COURT: -- you were seeking.

14 MR. CALLISTER: I guess as pointed out in the
15 opposition, your Honor, we believe that we provided
16 substantial beneficial interest to the estate. I understand
17 the opposition. The Court will recall the scenario.

18 We submitted a stipulation. We executed it. The
19 debtor executed it, and then the Court decided that it
20 needed to be provided and executed, signed off on by the
21 various committees. That never came back.

22 We're having threats of litigation against individual
23 investors who are saying there have not been a distribution
24 of interest payments since March. Don't you dare do that.
25 You're controlling millions of dollars of money. We don't

1 know what's going on.

2 So we sought the protection of an order and finally got
3 it and have been honoring that order and the contract
4 obligation since that time.

5 THE COURT: Okay.

6 MR. CALLISTER: We simply don't think we did
7 anything, other than what we should have done under the
8 circumstances, thought it was in the best interest of both
9 the estate, obviously, than my clients, your Honor.

10 THE COURT: Okay. All right. Opposition.

11 MS. MCPHERSON: Your Honor, Jeanette McPherson on
12 behalf of the debtors. PDG or Callister & Reynolds simply
13 don't come within the express statutory language of 503.

14 They're not creditors. They're not professionals for
15 creditors, and they didn't provide any substantial
16 contribution to the estate.

17 In fact, we think their actions were detrimental to the
18 estate, and that they weren't abiding by the disbursement
19 agreement which caused several issues.

20 We did finally reach a stipulation, but the fact is
21 they weren't abiding by the agreement that existed between
22 them and the debtors.

23 THE COURT: Okay.

24 MR. CALLISTER: Oh, I'm sorry.

25 MS. FREEMAN: Susan Freeman for the Unsecured

1 Creditors Committee. We joined in the debtor's objection.
2 There really has been no substantial contribution here and
3 no meeting of the requirements, and there has been no reply
4 to our response that raised all these points.

5 THE COURT: Right.

6 MR. CALLISTER: Again, just to be brief,
7 your Honor, as they point out in the in re Christian Life
8 Center case, the test that's operable here --

9 THE COURT: Well, but wait.

10 MR. CALLISTER: -- is --

11 THE COURT: You're not a creditor.

12 MR. CALLISTER: I understand. We're not a
13 creditor.

14 THE COURT: So how do you fit in?

15 MR. CALLISTER: We think under the 503(b)(3)(D)
16 referenced in the --

17 THE COURT: Right.

18 MR. CALLISTER: -- in re Christian Life Center --

19 THE COURT: It says, "A creditor, indenture
20 trustee, or equity security holder, or a committee, other
21 than --

22 MR. CALLISTER: I understand.

23 THE COURT: -- a committee in making substantial
24 contributions." It's a two-part test.

25 MR. CALLISTER: I understand, your Honor.

1 THE COURT: So how do you fit the first part of
2 the test?

3 MR. CALLISTER: I don't think we fall squarely
4 within the first part of the test. I understand that, but,
5 nevertheless, I think the response was the appropriate one
6 given the millions of dollars that we were holding, being
7 told by individual investors that they had not been paid,
8 and then threatening us with litigation if we should go
9 forward without some blessing or order of the Court.

10 So we executed the -- entered negotiations, got the
11 stipulation, and the problem was the creditors committee,
12 the same ones who are here opposing us today, simply did not
13 sign off on the stipulation.

14 I asked counsel what their position was when they were
15 sitting on that stipulation from May until nearly the end
16 June, the time of the hearing.

17 THE COURT: Okay. Well, I'm going to deny the
18 request. I mean, in order to be allowed administrative
19 expenses, one must fit themselves within the provisions of
20 503.

21 And then 503(b)(3) under certain circumstances will
22 allow one who makes a substantial contribution to receive
23 fees.

24 And, first of all, I don't think it was a substantial
25 contribution. It has to be more than -- I mean, the

1 circuits recognize that substantial contribution can include
2 your own self-interest, but it has to be "substantial
3 contribution". Both words must be taking effect.

4 And, more importantly, it has to be done by a creditor,
5 indenture trustee, equity security holder, or committee,
6 other than an official committee, so I'll deny the request.

7 MR. CALLISTER: Thank you, your Honor.

8 THE COURT: Okay. Thank you. Okay.

9 Next, we have the omnibus objections to the misfiled
10 claims.

11 MS. CARLYON: Thank you, your Honor.

12 Candace Carlyon on behalf of the First Trust Deed Committee.
13 This is our objection to a number of claims that while filed
14 in the First Trust Deed Fund -- excuse me -- relate either
15 to investments in the Diversified Trust Deed Fund or to
16 direct-lender interests as to particular loans.

17 The one exception is claim No. 138 to which our
18 objection has been withdrawn, and the Court approved that,
19 previously.

20 We have had no filed response. We received a letter
21 with regard to claims 86, 87, 88, 116, 117 requesting that
22 there be an evidentiary showing which we complied with and
23 have had no further communication. And, in fact, no
24 opposition was filed to the motion.

25 So we would request that the Court disallow those

1 claims as set forth on Exhibit 2, Docket No. 2285. I can
2 read the numbers into the record if you like. I don't know
3 that it's necessary --

4 THE COURT: I don't think we need to.

5 MS. CARLYON: -- with the exception, of course, of
6 138.

7 THE COURT: Okay. All right. Anyone here on any
8 of those objections?

9 (No affirmative response.)

10 THE COURT: All right. Those objections are
11 sustained.

12 And you've checked to make sure we're not as my concern
13 before cross-whipsawing?

14 MS. CARLYON: We have, your Honor. And, in fact,
15 I appreciate the opportunity to clarify the position on
16 that.

17 As to claims which are clearly USACM claims, we have
18 agreed with the debtors and the committees that the order
19 will provide that those will be deemed filed in that case
20 without prejudice to the right to object as of the date they
21 were filed in First Trust Deed Fund to make sure that that
22 doesn't happen to any of these investors who may have been
23 just confused by the number of debtors.

24 THE COURT: Okay. Thank you.

25 MS. CARLYON: All right.

1 THE COURT: Comment --

2 MS. CARLYON: (Indiscernible).

3 THE COURT: -- someone had?

4 MR. DEAN: Aaron -- excuse me. Aaron Dean on
5 behalf of Sondra Skipworth. I'm a little confused. I was
6 just curious if this objection applied to claim No. 74. I
7 know you said you were going to list those.

8 THE COURT: It's on the docket. Is there any
9 reason it shouldn't?

10 MS. CARLYON: Yes, your Honor. Claim No. 74 is
11 one of the claims as to which we objected based on it being
12 misfiled.

13 And, in fact, claim No. 74, the claimant is not an FTD
14 member. It appears to be based on a loan made to
15 Hacienda Estate, LLC, which I assume would be a
16 direct-lender claim.

17 MR. DEAN: That's potentially correct, your Honor.
18 I just received the file this morning. Ms. Skipworth has
19 been doing this on her own. Apparently, she did misfile her
20 claim into another case.

21 I'm here this morning to see if I can find out exactly
22 which case it should have actually been filed to to see if
23 we can make the proper amendments to get this claim filed --

24 THE COURT: Okay.

25 MR. DEAN: -- where it needs to be.

1 THE COURT: Why don't you just meet with counsel
2 afterwards because it sounds like that everybody -- the
3 point being, everybody's willing to let it be nunc pro tunc
4 back to the case that it should have been filed in, so
5 nobody's adversely affected.

6 MR. DEAN: Thank you, your Honor.

7 THE COURT: Thank you.

8 MR. DEAN: I'll wait 'til afterwards.

9 MS. CARLYON: Thank you.

10 MS. FREEMAN: Just to confirm from the perspective
11 of the Unsecured Creditors Committee, we do agree that the
12 claim can be treated as if it was filed in the USA
13 Commercial Mortgage estate on the date that it was filed.

14 THE COURT: Okay. Thank you.

15 Let me skip a moment to -- oh, here's another one
16 that's unopposed, page 7, Docket 8, the omnibus objection,
17 Brian Adams, et al.

18 MS. CARLYON: Candace Carlyon on behalf of the
19 First Trust Deed Fund. Your Honor, we stipulated to
20 continue the objection as to claims 123, 124, and 125. We
21 have had no opposition on claims No. 115, 118, and 119, and
22 would ask that the objection be sustained.

23 THE COURT: All right. And, again, they'll relate
24 back if they're in a different case, and you've checked
25 that?

1 MS. CARLYON: Yeah. Your Honor, I will check
2 that. I don't think that was an issue with these claims,
3 but I'll make sure.

4 THE COURT: Okay.

5 MS. CARLYON: Thank you.

6 THE COURT: All right. So with that, those three
7 are sustained. The other, do you want to continue to our
8 next date?

9 MS. CARLYON: I believe we continued to the
10 March 31st date.

11 THE COURT: Okay.

12 MS. CARLYON: And that order was already entered.

13 THE COURT: Okay.

14 MS. CARLYON: Let me just --

15 THE COURT: Thank you.

16 MS. CARLYON: -- make sure.

17 THE COURT: Let me skip to page 9, the application
18 to employ Diamond, McCarthy.

19 MS. CARLYON: I'm sorry, your Honor. If I could
20 just clarify? Docket No. 2559 is this Court's order
21 approving the continuance to March 1st --

22 THE COURT: March 1st.

23 MS. CARLYON: -- at 9:30 --

24 (Colloquy not on the record.)

25 THE COURT: Okay.

1 MS. CARLYON: -- on the Kantor claims.

2 MS. FREEMAN: Susan Freeman, your Honor, on behalf
3 of the Official Unsecured Creditors Committee in USA
4 Commercial Mortgage Estate.

5 MR. DIAMOND: Good morning, your Honor.
6 Alan Diamond with Diamond, McCarthy.

7 MS. FREEMAN: This is a matter, your Honor, where
8 we have asked that the special litigation counsel that the
9 USACM trust has decided to employ be employed on an interim
10 basis on behalf of the committee, so they can get up to
11 speed, deal with getting books and records, making sure that
12 there is no break in chain of custody, and those kinds of
13 problems get started on the litigation that we intend to
14 pursue.

15 We agreed with the U.S. Trustee we would make it very
16 clear here on the record that there is not a request to seek
17 compensation from this estate. The only compensation that
18 will be paid will be paid from the trust after the effective
19 date of the plan.

20 MR. DIAMOND: Yeah. And, your Honor, I might say
21 that it's a pleasure, indeed, to be back before your Honor
22 in this court.

23 Just to confirm our role that we're being asked to
24 provide as special litigation counsel to the Unsecured
25 Creditors Committee, the USACM, is to get in there,

1 investigate, analyze, and commence if necessary and
2 appropriate any litigation claims.

3 Ultimately, of course, we have been selected by
4 Mr. Berman as the trustee of the postconfirmation trust as
5 special litigation counsel once that trust becomes effective
6 under the plan.

7 THE COURT: Okay. All right. Mr. Landis, any
8 comments?

9 MR. LANDIS: Very briefly, your Honor. We did
10 have the opportunity to visit with counsel for the Unsecured
11 Creditors Committee.

12 Our only concern was we're sort of in a gap period now
13 because we're waiting for the effective date of the plan.
14 They have addressed those concerns.

15 Now, with the statements on the record that the estates
16 will not be charged for these fees, I think we got quality
17 counsel who will do the job well. I'm familiar with their
18 involvement in prior cases before the Court.

19 THE COURT: Okay. Thank you. All right.

20 So that's approved.

21 MS. JARVIS: Yes.

22 MS. FREEMAN: Thank you.

23 THE COURT: Let me --

24 MS. FREEMAN: We have a form of order that's been
25 approved --

1 THE COURT: Oh, sorry.

2 MS. FREEMAN: -- by everyone. We will upload it.

3 MS. JARVIS: Your Honor --

4 THE COURT: Okay. Thank you.

5 MS. JARVIS: Your Honor, if I could just say? The
6 debtors are working with them, and we believe this makes
7 sense. It would make a smooth transition.

8 THE COURT: Yes. All right. Let me go back to
9 item 10, the Spectrum Financial.

10 (Colloquy not on the record.)

11 THE COURT: Appearances.

12 MS. MCPHERSON: Jeanette McPherson on behalf of
13 the debtors.

14 MS. CADISH: Good morning, your Honor.
15 Elissa Cadish on behalf of Rolland Weddell and Spectrum
16 Financial Group.

17 THE COURT: On a housekeeping matter, did your
18 office send my office courtesy copies of your responses?

19 MS. CADISH: The answer is I don't know,
20 your Honor, and I apologize --

21 THE COURT: My notes --

22 MS. CADISH: -- if we did not.

23 THE COURT: -- indicate we had to print them all
24 out, and I have sanctioned Ms. Carlyon's firm and other
25 firms who are -- not sanctioned -- had them offset their

1 fees for not having provided documents, so that's \$75
2 payable to the court.

3 MS. CADISH: Yes, your Honor.

4 THE COURT: And that --

5 MS. CADISH: I'll take care of that, and I
6 apologize for the oversight.

7 THE COURT: And you can understand with the
8 filings like this it's just the only way we can keep up.

9 MS. CADISH: I do, and, again, it was an
10 oversight, and I'll make sure it doesn't happen again.

11 THE COURT: On this one, it seems to me we
12 (indiscernible) just going to have to set this for an
13 evidentiary hearing, right?

14 Have you done a -- do you want to just do a discovery
15 plan and do it in that context or postpone it until we see
16 happens in this case? What's your thinking?

17 MS. McPHERSON: Well, your Honor, during this
18 transition period, I thought if we set it over for 30 days.
19 In the meantime, we can discuss a discovery plan and
20 scheduling and then maybe set this again for the
21 March 1st --

22 THE COURT: Okay.

23 MS. McPHERSON: -- omnibus hearings, and then we
24 can pick dates at that time.

25 THE COURT: Sure. Is --

1 MS. CADISH: I agree with that.

2 THE COURT: Okay. So we'll set this over to
3 March 1st. Is that soon enough for you -- too soon I mean
4 or about right? It's about a month away.

5 MS. McPHERSON: I think --

6 MS. CADISH: That's fine.

7 MS. McPHERSON: -- that's fine.

8 THE COURT: Okay. Good. Okay.

9 Thank you.

10 MS. McPHERSON: Thank you.

11 MS. CADISH: Thank you, your Honor.

12 THE COURT: Okay. Now, let's go to one other
13 matter on the employment extensions on item No. 12.

14 MS. JARVIS: Your Honor, we have filed a motion to
15 extend the employment of Mesirow and Mr. Allison as the
16 interim crisis managers for the debtors, Ray, Quinney &
17 Nebeker, and Schwartzer McPherson as counsel for the debtors
18 and debtors in possession through March 31st or earlier if
19 we are able to conclude our role by then.

20 Hopefully, we will finish that before March 31st. If
21 there is some delay, then we would come back to the Court
22 and ask for a further extension.

23 THE COURT: Okay. All right. I note the
24 trustee's prior objections, and I'll overrule them and
25 continue the employment. It certainly makes no sense at

1 this time to change horses. All right.

2 Now, the first one, going back to the first matter on
3 calendar, the motion to enforce.

4 MR. SYLVESTER: Good morning again, your Honor.
5 Jeffrey Sylvester of Sylvester & Polednak on behalf of
6 USA Commercial Real Estate Group.

7 Your Honor, this is the third time we've been back on
8 this same motion. You may recall at the last hearing the
9 Court requested additional briefing with respect to the
10 effect, if any, of the confirmed plan with respect to the
11 claim of USA Commercial Real Estate Group, and I think both
12 sides have fully briefed that issue.

13 I will tell you that last night -- actually, on Monday,
14 an adversary complaint was amended to include a claim
15 against USA Commercial Real Estate Group alleging a
16 fraudulent transfer and also alleging setoff and recoupment
17 as it relates to the \$180,000.

18 Last evening, there was a motion for a writ of
19 attachment filed that is I believe set for the end of March,
20 and that's what's transpired since the last hearing.

21 THE COURT: You need to move your microphone a
22 little bit closer to your face or you can move the stand --

23 MR. SYLVESTER: Or my face --

24 THE COURT: -- if you wish.

25 MR. SYLVESTER: -- closer --

1 THE COURT: Your --

2 MR. SYLVESTER: -- to the microphone --

3 THE COURT: That's right.

4 MR. SYLVESTER: -- either one.

5 THE COURT: Either one. Either one.

6 MR. SYLVESTER: I can do both.

7 Thank you, your Honor.

8 THE COURT: The podium does go up and down. It's
9 counterintuitive, but it does go up and down.

10 MR. SYLVESTER: Okay. Is that better?

11 THE COURT: Yes. That's fine.

12 MR. SYLVESTER: All right. Let me just address
13 very briefly the debtor position as it relates to
14 subordination because at the last hearing that was,
15 apparently, the primary argument that was made or asserted
16 in opposition to the release of the funds.

17 In essence, what the debtor has argued is that the plan
18 ipso facto subordinated the claim of USA Commercial Real
19 Estate Group to those of the unsecured creditors.

20 And I think that the analysis begins and ends with I
21 think what the debtor will now concede is fact, and that is
22 that the moneys that are being held do not constitute
23 property of this bankruptcy estate. They just simply don't.

24 There's nothing in the terms of the plan that would
25 suggest that those funds that are being held are, in fact,

1 property of the estate.

2 The terms of the plan as it relates to distribution to
3 insiders provides that no insider shall receive a
4 distribution under the terms of the plan.

5 But it does not affect -- it does not expressly or
6 impliedly state that they are transmuting funds that are not
7 property of the estate into property of estate and
8 distributing those funds to creditors, and that's the
9 fundamental flaw in the argument.

10 Their brief specifically states that as a result of the
11 confirmed plan no entity may receive any payment or assert
12 any right to payment against assets of USA Commercial
13 Mortgage, and that's not what we have.

14 I think that the debtor will concede. At least, I hope
15 that academically they'll concede that the funds that they
16 hold under Section 541 do not constitute property of the
17 estate.

18 They don't constitute property of the estate under the
19 Ninth Circuit decision of in re Golden Triangle. They don't
20 constitute property of the estate under the terms and
21 conditions of the loan-servicing agreement. They're just
22 simply not property of the estate.

23 There is no claim or right to payment that
24 USA Commercial Real Estate Group could have asserted for the
25 return of those funds.

1 And if we acknowledge that those funds are held in
2 trust, then the United States Supreme Court tells us that
3 those funds cannot be distributed to anybody, other than the
4 trust beneficiaries, and that is the trust beneficiaries
5 being USA Commercial Real Estate Group.

6 If you look at the terms of the implementation of the
7 plan as set forth in the disclosure statement, there is no
8 express or implied suggestion that they are going to take
9 the funds that belong to the direct lenders and make those
10 funds property of the estate, and that those funds will be
11 available for distribution to the unsecured creditors or to
12 any creditors in this estate.

13 Now, remember how we got here is is that there was an
14 implicit acknowledgment by the debtors that the funds that
15 they were collecting pursuant to these loan service
16 agreements belonged to the direct lenders.

17 And that is why they came to this Court in July of 2006
18 and asked for permission to distribute those funds to those
19 who are entitled to receive them. The Court allowed that
20 subject to some modifications that relates to the netting of
21 the loan service fees.

22 But the \$60,000,000 that belonged to the direct lenders
23 were disbursed to the direct lenders because those funds
24 were held in trust.

25 Then the order was amended to allow additional

1 disbursements, another \$60,000,000 or a total of
2 \$120,000,000, that were disbursed because they weren't funds
3 that belonged to the estate. Those were funds that belonged
4 to the direct lender.

5 The debtor will concede that my client is a direct
6 lender and is not to be treated any different than any other
7 direct lender.

8 The plan confirmed, identified, or articulated the
9 compromise that the debtor reached with the direct lenders,
10 and the direct lenders and the debtors agreed that those
11 funds that are being held in trust and collected pursuant to
12 the loan service agreements would continue to flow to the
13 direct lenders.

14 In essence, they incorporated the terms and conditions
15 of the prior protocols as it relates to the disbursements of
16 the funds held in trust.

17 The debtor has to concede it, although they haven't
18 said that, but they have to concede that the funds are held
19 in trust and don't belong to this debtor and cannot be
20 distributed pursuant to the plans because they have now
21 sought a writ of attachment.

22 And if, in fact, that they believe their argument that
23 the terms of the plan precluded distribution of those funds
24 there would be no need for a claim of recoupment or setoff
25 to be asserted.

1 THE COURT: Well, but isn't that just a
2 belt-and-suspenders argument? I mean, you got to make --

3 MR. SYLVESTER: I --

4 THE COURT: -- both arguments.

5 MR. SYLVESTER: I don't. Well, I don't know. I
6 mean, they filed this pleading under Rule 11. And in the
7 pleading that they have filed with this court, what they are
8 saying very expressly is that they are holding these funds
9 for USA Commercial Real Estate. They cited that both in
10 their claim of recoupment in the adversary complaint and,
11 specifically, at paragraph 25.

12 THE COURT: Well, but the federal rules allow you
13 to plead in the alternative, clearly.

14 MR. SYLVESTER: Yes. But you can plead in the
15 alternative, but you can't plead alternative factual bases.
16 You can plead alternative legal theories.

17 But you can't say on the one hand it's held in trust
18 and the other hand it's not held in trust. Or on the one
19 hand, it's property of the estate. On the other hand, it's
20 not property of the estate. That is a factual statement
21 that doesn't fall within the alternative-pleading rules
22 under the federal rules.

23 And they have said in their motion that they are
24 collecting these funds as the servicer of the loan, and that
25 it is anticipated that additional sums will be collected by

1 the debtor on loans in which Commercial Real Estate Group is
2 a lender. They are collecting these funds on behalf of or
3 for the benefit of USA Commercial Real Estate Group.

4 THE COURT: Well, let me ask this. Let's just
5 suppose that since it was your clients that were not paying
6 out your -- the people that own the company you represent
7 were the same people who weren't paying out money on loans,
8 and let's assume somebody sued them for not distributing
9 funds, and they said, no, I don't have the money or whatever
10 reason. Your next recourse if you were the third party is
11 to sue them, right?

12 MR. SYLVESTER: To sue the company --

13 THE COURT: Right.

14 MR. SYLVESTER: -- for nondistribution?

15 THE COURT: Right.

16 MR. SYLVESTER: Okay. I believe that's -- if I
17 follow your analogy, if they --

18 THE COURT: So in other words --

19 MR. SYLVESTER: -- breached --

20 THE COURT: -- you're asking for a motion to
21 distribute. Isn't your remedy a suit for breach of
22 contract?

23 In which case the suit for breach of contract, they
24 then raise all of the various defenses that they have. I
25 mean, where is that -- I mean, we've done this motion to

1 distribute, and I --

2 MR. SYLVESTER: Correct.

3 THE COURT: -- understand that, and we've never
4 really visited, well, the procedure, but isn't the real
5 point that you'd have to sue for breach of contract?

6 MR. SYLVESTER: To the extent that I suffered
7 damages as a result of the breach of the contract. But
8 under your analysis, is the company holding the funds as a
9 trustee for the benefit of the third parties or is it simply
10 they breached the contract because they haven't serviced the
11 loans or they haven't collected the funds?

12 THE COURT: Both.

13 MR. SYLVESTER: Well, I think it makes a
14 difference because, yeah, you would have --

15 THE COURT: I mean, your client held the funds and
16 didn't turn them over.

17 MR. SYLVESTER: Sure. And they don't belong to
18 them, and the right I guess would be to claim conversion if
19 you will or to seek some other remedies --

20 THE COURT: So isn't your remedy --

21 MR. SYLVESTER: -- under law.

22 THE COURT: I mean, don't you have to file a
23 claim? And once you had to file a claim for breach of
24 contract, doesn't that fit you within the terms of the plan?

25 MR. SYLVESTER: I don't think so. That's true if

1 the debtor was taking the position that they owned the funds
2 that they weren't held --

3 THE COURT: Even if they --

4 MR. SYLVESTER: -- in trust.

5 THE COURT: -- didn't turn them over. All right?

6 Let's assume this is outside bankruptcy. All right?

7 MR. SYLVESTER: Um-h'm.

8 THE COURT: A loan mortgage company didn't turn
9 the funds over.

10 MR. SYLVESTER: Right.

11 THE COURT: You can't go to court and say compel
12 them to disburse. You file a complaint for breach of
13 contract, the remedies among which are declaratory relief,
14 damages, accounting, and turnover, right?

15 MR. SYLVESTER: I think that's fair.

16 THE COURT: So since you have to file the
17 complaint, doesn't that fit you within the provisions of the
18 plan?

19 MR. SYLVESTER: I don't think so because the
20 provisions of the plan don't -- and I guess that's the
21 primary difference between a state court action and property
22 of the estate under Section 541. This debtor is not coming
23 before this Court and saying that they own these funds.

24 THE COURT: All right.

25 MR. SYLVESTER: This debtor has come before this

1 Court on four different occasions and said we don't own
2 these funds. In essence, these funds belong to the direct
3 lenders.

4 We're going to service those, and we're going to take
5 our two percent or whatever, our loan-services fee, but
6 those aren't our money. We're not going to utilize those
7 funds to fund our plan of reorganization.

8 And if you look, in fact, in the disclosure statement,
9 there is no suggestion that they are taking the direct
10 lenders' funds held in trust to fund this plan of
11 reorganization.

12 If the debtor had come before this Court in their
13 disclosure statement, one of many, or their plan, one of
14 many, and said we are going to transmute these funds that we
15 acknowledge are held in trust, and they're going to now
16 become property of the estate, and I didn't object, then,
17 perhaps, I'm precluded.

18 Perhaps, I'm concluded because, frankly, I don't think
19 this Court would have the authority to enter an order
20 modifying the nature of the property.

21 For instance, you can't sell property under Section 363
22 that the debtor doesn't own, and you couldn't allow the
23 debtor to fund a plan of reorganization with proceeds of a
24 trust that --

25 THE COURT: But you'd still have to file a

1 complaint for conversion.

2 MR. SYLVESTER: If they claimed an interest in it,
3 and they don't.

4 THE COURT: No. Conversion is -- or even --

5 MR. SYLVESTER: The wrongful --

6 THE COURT: -- embezzlement.

7 MR. SYLVESTER: -- dominion and control over
8 somebody else's property.

9 THE COURT: Right.

10 MR. SYLVESTER: And --

11 THE COURT: You can't --

12 MR. SYLVESTER: And that's --

13 THE COURT: -- just --

14 MR. SYLVESTER: -- true.

15 THE COURT: -- file a motion to do that. You have
16 to file a complaint, right?

17 MR. SYLVESTER: I don't -- well, in bankruptcy
18 court, I think you'd probably have to file an adversary
19 complaint to have them --

20 THE COURT: Yeah.

21 MR. SYLVESTER: -- turn over --

22 THE COURT: By adversary.

23 MR. SYLVESTER: -- the funds.

24 THE COURT: Um-h'm.

25 MR. SYLVESTER: I think that's probably true. And

1 if your analogy was that or hypothetical was that this
2 debtor claimed to own those funds, then I think that I would
3 have to protect myself.

4 THE COURT: No. Let's just assume they refuse to
5 turn it over. Assume somebody outside bankruptcy, your
6 client, refused to turn it over.

7 MR. SYLVESTER: Outside of bankruptcy.

8 THE COURT: Right. Outside of bankruptcy.

9 MR. SYLVESTER: I think I would have to -- if I
10 can't exercise self-help, I have to file an action. I'd
11 have to get somebody to compel them to turn it over or I
12 have to go to the --

13 THE COURT: I mean, under the contract even.
14 Under the various loan-servicing contracts, they had the
15 right to terminate.

16 MR. SYLVESTER: But they don't have --

17 THE COURT: But they didn't have --

18 MR. SYLVESTER: -- the right --

19 THE COURT: -- the right --

20 MR. SYLVESTER: -- to hold the funds.

21 THE COURT: -- to go in and demand the money.
22 They had the right to sue.

23 MR. SYLVESTER: Right.

24 THE COURT: But they didn't have the right to go
25 in. And, in essence, what you're doing is asking them to

1 attach the money. You're asking them to do that by taking
2 it.

3 MR. SYLVESTER: Well, you asked them to do that,
4 candidly, to file a writ of attachment.

5 THE COURT: No, no, no. No. It goes both
6 directions.

7 MR. SYLVESTER: Sure.

8 THE COURT: The point is if it's not property of
9 the estate they may have to do a writ of attachment. My
10 point is, in essence, isn't that what you're doing under
11 your motion as opposed to a complaint? How can you get that
12 -- let's assume it was --

13 MR. SYLVESTER: And --

14 THE COURT: -- your money.

15 MR. SYLVESTER: And --

16 THE COURT: Let's assume there were absolutely no
17 claims against your clients.

18 MR. SYLVESTER: Right.

19 THE COURT: Let's assume there was --

20 MR. SYLVESTER: Right.

21 THE COURT: -- no setoff. Let's assume there was
22 no recoupment. Let's just assume somebody says we don't
23 want to pay you today.

24 MR. SYLVESTER: Right. And I think the direct
25 answer to your question is under these facts in this case I

1 didn't have to --

2 THE COURT RECORDER: I'm sorry, Counsel.

3 MR. SYLVESTER: -- file a --

4 THE COURT RECORDER: Would you move closer --

5 MR. SYLVESTER: Sure. Under these --

6 THE COURT RECORDER: -- to the microphone?

7 MR. SYLVESTER: -- facts in this case --

8 THE COURT RECORDER: Thank you.

9 MR. SYLVESTER: -- I didn't have to file because
10 you had ordered that the funds that they had collected on
11 behalf of the direct lenders be distributed to the direct
12 lenders. That's the order of this Court on not one, on not
13 two, but now three occasions.

14 And so what I have done is asked to enforce the order
15 of the Court, and we did that preconfirmation because that's
16 what the Court ordered.

17 To the extent that they -- and, remember, your Honor,
18 it's not their position that these funds don't belong to my
19 client.

20 Their initial opposition was that we just want a
21 comfort order because, you know, we may have claims against
22 USA Commercial Real Estate Group.

23 They have never claimed not to this day an interest in
24 those funds. They don't claim to own those funds. And if
25 they don't claim to own those funds and if this Court has

1 already previously ordered now on three occasions that they
2 be disbursed, then the proper forum is in this court today
3 under this motion to seek to enforce the order.

4 What you are suggesting and what the debtor is
5 suggesting is that, well, there should have been a claim.
6 Well, if that's true, then every direct lender in order to
7 be entitled to receive payment should have filed a proof of
8 claim.

9 But this Court may recall that the direct lenders were
10 not permitted to file proofs of claim in this bankruptcy
11 estate save and except for claims of unremitted principal or
12 claims that related to some fraud that gave rise to a claim
13 outside of the service agreement itself.

14 We weren't even authorized to file a proof of claim,
15 and I think that you were hearing objections by the various
16 committees to the proof of claims that the direct lenders
17 did file.

18 Getting back to the issue of subordination, there is
19 nothing in the disclosure statement, the first one or the
20 second one or the third one or the proposed plan, that
21 suggests that my client is going to be treated any
22 differently than any direct lender. They could have done
23 that, and they didn't.

24 They could have said that USA Commercial Real Estate
25 Group even though it's a direct lender they have to file a

1 proof of claim because we have rights of setoff or they have
2 to file a proof of claim because we have transmuted the
3 trust asset to an asset of the bankruptcy estate, and they
4 didn't.

5 They simply said you've got a general subordination
6 provision that says if you're going to get a distribution
7 from the estate, then it's subordinated.

8 But their plan does not provide for distribution of the
9 funds held in trust to anybody. It just doesn't, except
10 that the compromise with the direct lenders states that the
11 funds that they receive in trust will be distributed, and I
12 am not treated any differently.

13 And for those reasons, I think that the Court is
14 compelled, respectfully, to issue an order allowing those
15 funds to be released. Now, I understand that there's a
16 motion for a writ of attachment pending, but that's for
17 another day.

18 THE COURT: Okay.

19 MR. SYLVESTER: Thank you, your Honor.

20 THE COURT: All right. Opposition.

21 MS. JARVIS: Your Honor, first, I think we need to
22 understand who USA Real Estate Group is. It's an entity
23 that's wholly owned by Tom Hantges and Joseph Milanowski.

24 It has no employees. And other than HMA which is
25 currently the subject of an adversary proceeding, it has no

1 other clients or customers.

2 It is supposedly a real estate brokership. Tom Hantges
3 is the only broker that they have had since at least over a
4 year.

5 Further, since the filing of their motion to
6 distribute, we have discovered through 2004 examinations
7 that have been taken, actually, since the last hearing on
8 this before the Court that USA Real Estate Group has
9 received \$435,000 from the Royal Hotel closing after
10 Mr. Milanowski told Mr. Allison that Diversified Fund would
11 be paid millions of dollars from the proceeds after we had
12 traced I think it's 4.6 million dollars directly from
13 Diversified into the Royal Hotel and 9,000,000 indirectly.

14 There is no evidence that we have been able to
15 ascertain that USA Real Estate did any services for
16 Royal Hotel, and, yet, they were paid ahead of the claims of
17 Diversified Trust Fund that have direct claims on the
18 Royal Hotel.

19 It's argued that we concede that this is not property
20 of the estate, this money that is to be distributed, and
21 that is not correct, your Honor.

22 We did reserve our rights in the plan. The plan is
23 very clear that with respect to these nondebtor insiders
24 they are subordinated claims. They are not part of the
25 direct-lender groups.

1 If you look at paragraph 81 of the confirmation
2 order --

3 THE COURT: I need -- hang on one second. You
4 need to point me to that. It's in your pleading, right?

5 MS. JARVIS: Yeah. 81 of the confirmation order.
6 I'm not sure that that's attached.

7 THE COURT: Oh, it's not?

8 (Colloquy not on the record.)

9 MS. JARVIS: Let me preliminarily say, your Honor,
10 that it's very clear that the nondebtor insider definition
11 was --

12 THE COURT: Oh, there's no question of that.

13 MS. JARVIS: It's --

14 THE COURT: I --

15 MS. JARVIS: Yeah. It's --

16 THE COURT: And I don't --

17 MS. JARVIS: It's in there, so --

18 THE COURT: Now, just so we're clear, this is
19 money to which we've already applied. Let's be clear what
20 money we're talking about, too. As I understand it, this is
21 money that USA Realty purportedly was a direct lender in.

22 MS. JARVIS: That is correct, your Honor.

23 THE COURT: And moneys had been paid back on those
24 loans. And after recoupment and netting applicable to
25 everybody else, there is still some sum of money which but

1 for everything else would go to them.

2 MS. JARVIS: That is correct, your Honor.

3 THE COURT: Okay. And if they weren't insiders in
4 other words --

5 MS. JARVIS: Yeah.

6 THE COURT: -- it would clearly go to them. Okay.

7 MS. JARVIS: And, you know, your Honor --

8 THE COURT: So we've already applied --

9 MS. JARVIS: Okay.

10 THE COURT: -- the netting that everybody else
11 is --

12 MS. JARVIS: Right.

13 THE COURT: -- subjected to.

14 MS. JARVIS: And as you recall, your Honor, in the
15 motions to distribute that we did on an interim basis, we
16 never conceded, and the issue was avoided on whether this
17 was property of the estate or not.

18 THE COURT: That's right.

19 MS. JARVIS: It was left to be determined in the
20 plan of reorganization, and that determination is part of
21 the releases granted to direct lenders.

22 But the nondebtor insiders including USA Real Estate
23 Group were specifically excepted out of the releases given
24 to the direct lenders.

25 THE COURT: For (indiscernible) any reason I

1 didn't bring those particular pleadings in the
2 (indiscernible).

3 What docket number is the plan?

4 (Colloquy not on the record.)

5 THE COURT: Or maybe it's easier if you point --

6 MS. JARVIS: It --

7 THE COURT: You say --

8 MS. JARVIS: -- would be --

9 THE COURT: Did you refer --

10 MS. JARVIS: It was --

11 THE COURT: -- to it?

12 MS. JARVIS: -- January 8th that it was entered.

13 THE COURT: Okay.

14 (Colloquy not on the record.)

15 MS. CARLYON: Your Honor, I'm passing up a copy of
16 the plan with the direct-lender --

17 THE COURT: Oh, good.

18 MS. CARLYON: -- releases --

19 THE COURT: Thank you.

20 MS. CARLYON: -- provision now.

21 THE COURT: Okay. All right. Go ahead.

22 MS. JARVIS: Okay. In paragraph 81 of the
23 confirmation order, it says, "Notwithstanding that," and
24 there's a whole list of insiders. It's very broad and
25 includes --

1 THE COURT: Wait, wait, wait.

2 MS. JARVIS: -- specifically --

3 THE COURT: Paragraph --

4 MS. JARVIS: -- U.S. --

5 THE COURT: -- 81.

6 MS. CARLYON: Your Honor, I'm sorry.

7 MS. JARVIS: Paragraphs --

8 MS. CARLYON: What --

9 MS. JARVIS: Oh. Oh, no. It's not in the plan.
10 It's in the confirmation order that I'm now citing to, so --

11 MS. CARLYON: And, unfortunately, your Honor, I
12 didn't have an extra copy of that with me.

13 MS. JARVIS: Yeah. And --

14 MS. CARLYON: But there was --

15 THE COURT: Oh, so you don't have that here.
16 Okay.

17 MS. CARLYON: Right. There was a prior mention of
18 the scope of releases under the plan. I did happen to have
19 that, so I passed it up.

20 THE COURT: That's all right. I've got the
21 findings of fact. Okay. 88, you said?

22 MS. JARVIS: It's 81, paragraph 81.

23 THE COURT: Whoops, that's the findings. Okay.

24 MS. JARVIS: It's I think the next to the last
25 paragraph.

1 THE COURT: Okay. Now I'm with you.

2 MS. JARVIS: Okay. In paragraph 81, it says,
3 "That notwithstanding that" -- and then there is a whole
4 list of insiders -- "including USA Commercial Real Estate
5 Group have some connection with the debtors or the debtor's
6 estate.

7 And notwithstanding anything in the plan to the
8 contrary or which could be construed to the contrary,
9 nothing in the plan nor this confirmation order shall be
10 construed as providing a release of any claims or causes of
11 action against the insiders, including USA Commercial Real
12 Estate Group."

13 And if you turn to the plan, your Honor, if you'd turn
14 to the plan on -- actually, I think you have -- if you turn
15 on page 51 of the copy that was handed up to you --

16 THE COURT: Oh.

17 MS. JARVIS: -- by Ms. Carlyon --

18 THE COURT: Okay.

19 MS. JARVIS: -- it's in paragraph -- it's
20 Article 4(b)(1)(A) where it talks about the release given to
21 the direct lenders, so USA Commercial Mortgage, all the
22 nondebtor insiders, are excepted from that release.

23 THE COURT: This is page 75 --

24 MS. JARVIS: No.

25 THE COURT: -- the 207 --

1 MS. JARVIS: Yeah. Turn back --

2 THE COURT: -- of the joint?

3 MS. JARVIS: -- to page 51.

4 THE COURT: 51. Okay. Oh, release. I have it.

5 MS. JARVIS: Um-h'm.

6 THE COURT: Okay. Releases all claims.

7 MS. JARVIS: This is the provision which
8 acknowledges that it's not property of the estate because it
9 releases the claims against direct lenders, including, but
10 not limited to surcharge, recharacterization of
11 direct-lender loans.

12 So this is the provision that would acknowledge that
13 it's not property of the estate, but it only extends to the
14 direct lenders receiving a release.

15 The insiders were specifically excepted out of that,
16 and so we --

17 THE COURT: So the issue as whether or not it's
18 property of the estate is still open --

19 MS. JARVIS: Exactly.

20 THE COURT: -- as to the insiders.

21 MS. JARVIS: Right. There is no concession to
22 that, and we have specifically provided that the nondebtor
23 insider claims are subordinated and are not to be paid until
24 all their claims in the estate are to be paid.

25 And we contend that this claim -- and by the way,

1 USA Real Estate Group has filed claims for these amounts in
2 this estate, and those claims are subject to subordination
3 and cannot be paid until --

4 THE COURT: So they have filed claims on behalf as
5 direct lenders?

6 MS. JARVIS: That's my understanding, your Honor,
7 yes.

8 MR. SYLVESTER: Your Honor --

9 (Colloquy not on the record.)

10 MR. SYLVESTER: -- (indiscernible).

11 THE COURT: Okay.

12 MS. JARVIS: And even if they didn't, your Honor,
13 it wouldn't matter because it's still the claims that they
14 have are subordinated. They do not receive --

15 THE COURT: So --

16 MS. JARVIS: -- this release.

17 THE COURT: But what theory would you have to say
18 that the money from the direct lender is property of the
19 estate?

20 And we're talking here -- forget all the defenses,
21 et cetera. I mean, the analogy would be they had a bank
22 account someplace else, and, perhaps, you'd have a right to
23 attach it, and, perhaps you'd have a right to -- or,
24 perhaps, you'd have a right to attach it.

25 And the other idea would be if they were a member of

1 the fund, clearly, you would have the right to offset that
2 because they were fund members, and their moneys trickled
3 down.

4 But with direct lenders, what would the theory be to
5 do? That those funds would be property of the estate. Now,
6 as against everybody else, that's --

7 MS. JARVIS: Yeah. That's not --

8 THE COURT: -- not fair game --

9 MS. JARVIS: That's --

10 THE COURT: -- anymore.

11 MS. JARVIS: That's a done deal.

12 THE COURT: That's been resolved.

13 MS. JARVIS: Right. Well, your Honor, one of the
14 -- I mean, the main issue that we resolved in the plan was
15 this issue of recharacterization because there had been
16 substantial commingling of the funds.

17 And, in fact, the commingling was done by the very
18 parties that are in here that control this entity that are
19 now asking to be paid, you know, ahead of all the other
20 legitimate claims in this estate, so that, you know, is a
21 theory that is still open and very applicable to this.
22 There also are open issues --

23 THE COURT: Of course, the problem is the money
24 we've collected postpetition clearly was segregated because
25 Mr. Allison was involved.

1 MS. JARVIS: Right. But it doesn't, for instance,
2 you know, solve the issue with respect to recharacterizing
3 the loan itself as one that shouldn't be treated as a
4 direct-lender loan.

5 It should be treated as, you know, a unsecured
6 obligation of this debtor because of the commingling that
7 went on prior to this bankruptcy being filed.

8 In addition, we have, you know, recoupment, other, you
9 know, surcharge, you know, claims that we could make, and we
10 haven't settled those. We haven't said --

11 THE COURT: Well, I --

12 MS. JARVIS: -- we aren't --

13 THE COURT: -- certainly --

14 MS. JARVIS: -- going to try to recoup additional
15 amounts from them.

16 THE COURT: I certainly understand recoupment.
17 You know, netting is different because netting is -- the
18 point is they overpaid on those particular loans.

19 Oh, but I guess your point is there may be other loans
20 that they were overpaid on that we don't even know about,
21 yet.

22 MS. JARVIS: Well, there may be other claims. I
23 mean, we now know of one claim that we have, you know,
24 coming out of the Diversified estate because they now have
25 just received \$430,000 that, you know, we contend belongs

1 first and foremost to Diversified.

2 And, of course, that's, you know, a significant issue
3 because this is a company that has no business, no
4 employees. And, therefore, if money is paid over to this
5 company, it's going to be difficult to get any money back.

6 We already have outstanding, your Honor, over
7 \$110,000,000 in claims against -- you know, the IP entities
8 have not collected a dime, and this is one of the affiliates
9 of IP.

10 And, therefore, there are significant claims that we
11 have that we want to reserve our rights to recoup or offset
12 against these moneys.

13 THE COURT: And, of course, now, could you recoup
14 if it wasn't property of the estate?

15 MS. JARVIS: In certain -- yeah. I mean, you can
16 in the instance where you have a claim that you are allowed
17 to recoup. I mean, recoupment is just determining what the
18 claim is.

19 In other words, the property of the estate doesn't come
20 out until after you determine the recoupment claim. I mean,
21 that's essentially what, you know, the Court already has
22 ruled, so it just determines what's owed, so we recoup
23 first, and then you determine what would go, you know, to a
24 direct lender.

25 THE COURT: Okay.

1 MS. JARVIS: You know, alternatively,
2 your Honor -- and we did, you know, allege this
3 alternatively just in case the Court ruled that this is not
4 subordinated -- we have filed a complaint against USA
5 Real Estate Group. We have filed a motion for a prejudgment
6 writ of attachment.

7 We believe that we have a good claim for that, and we
8 would ask that the Court allow that to be heard on its
9 merits before any funds are disbursed to USA Real Estate
10 Group, particularly in light of the fact that it appears
11 that recovery of those funds since this is a company that
12 does no business, has no employees, and is owned by
13 Mr. Milanowski and Mr. Hantges that that not be allowed to
14 be disbursed until we can have that prejudgment writ of
15 attachment heard if the Court rules that the claim is not
16 subordinated.

17 THE COURT: Okay. Ms. Freeman.

18 MS. FREEMAN: Susan Freeman, counsel for the
19 Unsecured Creditors Committee. We joined in the debtor's
20 objection on this.

21 And I just wanted to emphasize that your Honor is I
22 believe completely accurate in your analysis with respect to
23 them having a claim.

24 Their claim is for failure to distribute these funds,
25 and that claim is certainly subject to setoff and

1 recoupment, and that claim under the plan is subordinated
2 and gets nothing.

3 To the extent that these are funds that are being held,
4 they have a claim for wrongful withholding of those funds,
5 and that is subject to setoff.

6 To the extent that those funds are being held now,
7 certainly, whenever funds come into the hands of the estate,
8 the estate can hold on to those, so that it can offset
9 against them, and so that it can recoup against them.

10 That's part of kind of the underlying analysis of all
11 of the various holdbacks that we've had, and it's a
12 fundamental analysis for the entire plan of reorganization
13 and the basis for holding back the money and allowing it to
14 be distributed back to all of the unsecured creditors.

15 These are people who are quintessential insiders. And
16 to the extent that they have claims based upon transactions
17 that they entered into, they knew where the money went and
18 how it was being commingled.

19 They knew to the extent that the money that they put in
20 for direct lenders and that was coming back from borrowers
21 was being siphoned off and being sent to other places. They
22 were the ones who were controlling it.

23 To the extent that there are recharacterization claims
24 that still exist because those were not released against
25 those insiders, those are very much alive and well and

1 available to be pursued.

2 THE COURT: Okay.

3 MS. FREEMAN: Thank you.

4 MR. SYLVESTER: A couple of issues first. I'm a
5 bit stunned that counsel would state to your Honor that
6 USA Commercial Real Estate Group filed proofs of claims for
7 the funds held. We set forth in the reply that that's not
8 true.

9 We did file two proof of claims. One was clearly
10 checked for unremitted principal, and one was clearly
11 checked as there was an unsecured loan by and between
12 USA Commercial Real Estate Group and the debtor. We have
13 not at any point submitted a proof of claim for the funds
14 that are held in trust.

15 The issue is, ultimately -- and, frankly, it's
16 difficult with this debtor and this committee because the
17 defense has changed each and every time we come back to this
18 Court.

19 The first time we were here, it was simply that, well,
20 we have claims of setoff. And in opposition or in response
21 to the claim of setoff, I said you don't have setoff.

22 You can't by operation of the law because you don't
23 have mutuality of debt, and you cannot set off funds held in
24 trust because you just simply lack the element of mutuality.

25 They never opposed that. They never came to this Court

1 and said, yes, we do have mutuality because we have the
2 right to recharacterize this debt because these funds really
3 are property of this bankruptcy estate.

4 There is nothing in the disclosure statement or the
5 plan that suggests that they are going to recharacterize
6 these funds that they hold in trust for the benefit of
7 Commercial Real Estate Group to property of the estate.

8 There is nothing that would provide fair notice to my
9 client that that's what the intent of the plan of
10 reorganization was.

11 And I understand that there is this new argument that
12 what they really want to do is attempt to set out in the
13 future some argument that they could recharacterize this
14 debt.

15 But they haven't given you a scintilla of legal
16 authority, not a case, not a provision in the plan, nothing,
17 in fact, not even an assertion that the funds that they hold
18 are property of this bankruptcy estate.

19 You asked for additional briefing, and their briefing
20 was, well, you're subordinated, and then if you're not
21 subordinated we have issues of setoff and recoupment.

22 And you asked Ms. Jarvis very directly how is it
23 property of the estate, and she started talking about
24 commingling.

25 But that when you pointed out the fact that

1 postpetition they'd collect this money in the service
2 agreement, and they can account for that, and that hasn't
3 been commingled, then there is no response.

4 The resolution of both setoff, recoupment, and whether
5 this claim has been subordinated begins and ends with
6 whether or not this is property of the bankruptcy estate
7 because under subordination if it is not property of the
8 bankruptcy estate which is what the Nevada law says, which
9 is what the loan service agreement says, which is what the
10 Ninth Circuit says, then it cannot be used and cannot be
11 distributed under the terms of a plan of reorganization by
12 operation of law. They know that.

13 They haven't come to this Court and said this is why
14 it's property of the estate. And if they don't do that,
15 then the Court has to enforce its prior order where they ask
16 for permission to make these funds available to the direct
17 lenders and to release those to the direct lenders.

18 They could have gone back and modified the prior
19 interim distribution orders to carve out USA Commercial
20 Real Estate Group or they could have put in the plan of
21 reorganization that while it's true that we acknowledge that
22 the funds held for the other direct lenders are not property
23 of the estate we want to focus on and save for a later date
24 the issue that these are.

25 When you asked counsel how is it that they can be

1 property of the estate, there was no response, and this is
2 the third time that we are here.

3 I have cited Nevada law, Ninth Circuit law, the loan
4 service agreement, the Nevada Administrative Code, and it's
5 not property of the estate.

6 I don't have a claim in this bankruptcy for the
7 distribution of those funds. I have a claim for damages
8 that may result of the conversion.

9 But nothing, nothing that this Court could do, frankly,
10 under a confirmed plan can transmute property that they hold
11 in trust for the beneficiaries to property of the bankruptcy
12 estate.

13 They haven't provided you any authority to support that
14 proposition. And if they cannot, then subordination doesn't
15 apply. And if they cannot, then setoff doesn't apply.

16 You want to give them a writ? Well, let's come back on
17 a date when we can entertain whether or not they can get a
18 writ of attachment on the funds that they hold in trust, and
19 I will come back, and I'll argue another day on that issue.

20 But the order of this Court should be enforced, and,
21 frankly, setoff doesn't apply, and the terms of the
22 confirmed plan don't apply.

23 Thank you.

24 THE COURT: Okay. All right. Thank you.

25 I'm going to deny the motion because we don't have a

1 finding at this stage that it, indeed, is their property as
2 opposed to property of the estate.

3 Now, when I say I deny it, I'm viewing it as a summary
4 judgment, in essence. The point being we don't know that
5 this is not property of the estate.

6 I think you may have some problems with that analysis
7 because you don't have because -- because Mr. Allison has
8 done what he's supposed to do, those funds haven't been
9 commingled.

10 But by the same time, I'm not willing to try and think
11 through all the ways in which the commingling effectuates
12 the whole process.

13 I understand it's extremely frustrating for you,
14 extremely frustrating for me, to be in a position where
15 you're going to turn over \$180,000 to the very wrongdoers.

16 But the problem is, you know, you've got to keep your
17 legal analysis straight or we're all on a very slippery
18 slope here.

19 At least, we now have a plan which the plan says all
20 other direct lenders is not property of the estate, but
21 you're right.

22 You have reserved as against them the issue of whether
23 or not it's property of the estate, and you're absolutely
24 right.

25 Along the way when I was ready to suggest it wasn't

1 property of the estate, you all said, no, do not make that
2 determination.

3 And I think in retrospect rightfully so because the
4 commingling issues have become much broader than I think we
5 all thought along the way.

6 But if it was property of the estate, the next step is
7 what happens -- if it wasn't. Excuse me. If it wasn't
8 property of the estate, what's the next step that happens,
9 and I do think that you then get thrown into the claim
10 process.

11 What's the remedy? Well, the remedy isn't just to
12 distribute. The remedy is to file a complaint or a claim
13 for -- and it would be a claim against the trustee. It
14 wouldn't be a prepetition claim that's barred or be a
15 postpetition claim.

16 It would be a complaint for a turnover. In which case,
17 I think the defenses may then arise, but you wouldn't reach
18 that result until you knew whether or not it was property of
19 the estate.

20 If I determine it was property of the estate, I guess
21 the point is I still couldn't order the distribution of the
22 funds. You'd still have to bring a complaint. You'd have
23 adjudication. You'd then bring a complaint.

24 If you want to move up the attachment hearing, so we
25 end the ambiguity at least on that legal theory, we

1 certainly can do that.

2 (Colloquy not on the record.)

3 MR. SYLVESTER: I sort of can't speak to the
4 attachment theory, but I would request that this Court then
5 treat this as a --

6 THE COURT RECORDER: I'm sorry, Counsel.

7 MR. SYLVESTER: I'm sorry.

8 THE COURT RECORDER: (Indiscernible).

9 Thank you.

10 MR. SYLVESTER: Again, Jeff Sylvester. I would
11 request that this Court then treat this as a contested
12 matter and allow us to treat it as an adversary if you will
13 and allow me to do some discovery if necessary and set it
14 for an evidentiary hearing, so we can have that issue
15 resolved.

16 THE COURT: Okay. Now, I am not going to -- you
17 know, they may say you've got to file a complaint. I'm not
18 going to rule on whether or not you have to do it by means
19 of adversary as opposed to a contested proceeding.

20 MR. SYLVESTER: Well, that's --

21 THE COURT: But you're right.

22 MR. SYLVESTER: -- what I'm asking.

23 THE COURT: Whatever it will require, it's going
24 to require -- that issue is an evidentiary matter.

25 MS. JARVIS: And, your Honor, we would be amenable

1 and think it makes sense, actually, to have the motion for a
2 prejudgment writ of attachment done on an expedited basis.
3 We would just need probably some expedited discovery before
4 then as well.

5 THE COURT: Right. Because the point is that
6 would moot the issue if I grant the attachment.

7 MS. JARVIS: Exactly, your Honor.

8 (Colloquy not on the record.)

9 THE COURT: Oh, I need a calendar, Eileen.

10 (Colloquy not on the record.)

11 MS. JARVIS: Your Honor, I think it's currently
12 set for March 1st. I think our next hearing date is
13 February 15th.

14 THE COURT: Oh, I thought you said March 31st.
15 Sorry. Does March --

16 (Colloquy not on the record.)

17 THE COURT: Well, when would you be making the
18 next distributions, anyway?

19 (Colloquy not on the record.)

20 MR. SYLVESTER: To my client?

21 (Colloquy not on the record.)

22 THE COURT: No. When is Mr. Allison -- when were
23 the next distributions being made?

24 (Colloquy not on the record.)

25 MS. FREEMAN: They're planned for the end of this

1 month, your Honor.

2 THE COURT: The end of this --

3 (Colloquy not on the record.)

4 THE COURT: The end of January?

5 (Colloquy not on the record.)

6 THE COURT: Oh, okay.

7 MS. JARVIS: Yeah. Okay. The January
8 distributions will be next week, then the February
9 distributions would be at the end of February.

10 MR. SYLVESTER: But I guess that begs the
11 question, your Honor, I mean, for how long and what period
12 of time is this debtor going to claim an interest in the
13 ongoing distributions. Does it end at --

14 THE COURT: No.

15 MR. SYLVESTER: -- the confirmation?

16 THE COURT: No. We have to resolve this. You're
17 right. I'm not disagreeing with you.

18 MR. SYLVESTER: Not today, necessarily.

19 THE COURT: Right. Just not today. You're right.
20 Well, do you want to wait 'til March 1st?

21 (Colloquy not on the record.)

22 THE COURT: I think 30 days would --

23 MS. McPHERSON: The --

24 THE COURT: I certainly would be --

25 MS. McPHERSON: Your Honor --

1 THE COURT: Certainly, the motion should be
2 delayed for 30 days.

3 MS. McPHERSON: Your Honor, on March 2nd is
4 another motion.

5 THE COURT: So do you want to do it on March 2nd?

6 MS. McPHERSON: Well, it would tie in with the
7 other motion for a writ.

8 (Colloquy not on the record.)

9 THE COURT: Yeah.

10 MS. McPHERSON: So you could hear them together.

11 (Colloquy not on the record.)

12 THE COURT: Okay. So we'll do it March 2nd at
13 9:30 will be the hearing on the motion for a writ of
14 attachment.

15 MS. JARVIS: Thank you, your Honor.

16 MR. SYLVESTER: Very good, your Honor.

17 THE COURT: And in the meantime, if you want to
18 see if they want to do a discovery plan. If they disagree
19 and say it has to be done by an adversary, we can address
20 that.

21 MR. SYLVESTER: Very good.

22 THE COURT: Okay.

23 MR. SYLVESTER: Thank you, your Honor.

24 THE COURT: I mean, because they hadn't raised
25 that issue before, I appreciate that. Okay.

1 Thank you.

2 I did have a calendar, Eileen -- I apologize -- or did
3 you give me two?

4 THE CLERK: Well --

5 THE COURT: Wait. Oh, this one right here? No.

6 THE CLERK: Yeah.

7 THE COURT: Oh, I think this goes back in this
8 pile, Eileen. Okay.

9 And do we have anything besides the -- oh, we've got
10 the Western Life. Let's take a short recess, and then we'll
11 do Western Life and then the protective order, and then
12 we'll go to the Tree Moss issues.

13 MS. CARLYON: We also have the Standard objection
14 to claim, your Honor.

15 THE COURT: Oh, Standard. Right.

16 Thank you.

17 MS. CARLYON: Thank you.

18 THE CLERK: All rise.

19 (Recess at 11:06:40 a.m.)

20 (Court reconvened at 11:22:39 a.m.)

21 THE COURT: Be seated.

22 (Colloquy not on the record.)

23 THE COURT: Okay. On the first Western Insurance
24 (sic).

25 Did I misspeak the name?

1 MS. JARVIS: Which one is this?

2 MR. LEATHAM: No. That is correct, your Honor.

3 THE COURT: Okay.

4 MR. LEATHAM: Nile Leatham --

5 (Colloquy not on the record.)

6 MR. LEATHAM: -- for Western United Life
7 Assurance. Michael Anglin from Fulbright & Jaworski is
8 here. He will be making the argument --

9 THE COURT: Okay.

10 MR. LEATHAM: -- on behalf of our client.

11 THE COURT: Well, let me just because it's late.
12 I've got a noon conference call. I don't want to have to
13 bring you back. Let me just tell you my inclination.

14 The stay is going to end within two weeks because,
15 hopefully, the plan will go effective, so my inclination was
16 to deny as a preliminary matter and continue to a final
17 hearing over for 30 days, so with that in mind.

18 And I understand your arguments, but I do think there's
19 a Ninth Circuit case that indicates that, you know, even if
20 they've got a junior interest that that's property of the
21 estate.

22 MR. ANGLIN: Your Honor, Mike Anglin for the
23 record. If the Court does rule that way, we will certainly
24 respect that order, and there is no question about that.

25 If the Court would indulge me just a short presentation

1 of our position, I think I'd rather be able to tell my
2 client I --

3 THE COURT: Okay.

4 MR. ANGLIN: -- at least --

5 THE COURT: Sure.

6 MR. ANGLIN: -- explained it if you don't mind,
7 but it will not be long, your Honor.

8 THE COURT: Okay. Go ahead.

9 MR. ANGLIN: Oh --

10 MS. JARVIS: Oh --

11 MR. ANGLIN: -- I'm sorry.

12 MS. JARVIS: -- did you want us --

13 THE COURT: Because it's your motion.

14 MS. JARVIS: It's our motion. Right.

15 THE COURT: Oh, it was your motion.

16 MS. JARVIS: Yes.

17 THE COURT: I'm sorry.

18 MS. JARVIS: It's our motion.

19 THE COURT: It was a motion to enforce. I
20 apologize. I had it converse. I was thinking you had filed
21 your motion to lift stay. You hadn't.

22 MS. JARVIS: Your Honor, I think as, obviously,
23 your Honor has read the papers and I think as you understand
24 Western United has a first lien on certain Montgomery County
25 property.

1 And USA Commercial Mortgage arranged a loan for
2 10.475 million dollars that has a second lien on this same
3 property as well as a first lien on another piece of
4 property.

5 It's important to note the total amount owed at this
6 point on the USA Commercial Mortgage loan is there is
7 10.475 million still owed on the principal. There's almost
8 \$1,000,000 in interest owed.

9 There are late fees of 23-, about almost \$24,000, and
10 exit fees of 262, approximately, thousand dollars. That's
11 important because this ties also into the Compass sale as
12 well.

13 First Trust Deed has a 4.77 interest in the loan.
14 Diversified Trust Deed has a 5.96-percent interest in the
15 loan. USA Commercial Mortgage has an interest in the late
16 fees and the exit fees.

17 Those are being sold to Compass. And if there is some
18 impairment of those or if they are not collected or waived,
19 then this could result in a purchase-price adjustment on the
20 Compass loan, so it is very important to the debtors that
21 this not go forward.

22 The Texas Court --

23 THE COURT: Is this a loan that was then sold to
24 Compass or is this one they --

25 MS. JARVIS: No.

1 THE COURT: -- excised out?

2 MS. JARVIS: Well, the First Trust Deed portion of
3 it is being sold --

4 THE COURT: Okay.

5 MS. JARVIS: -- to Compass, and the servicing
6 rights are being sold --

7 THE COURT: Um-h'm.

8 MS. JARVIS: -- to Compass, and the Diversified
9 Trust Deed Fund interest is being serviced by Compass as
10 part of this.

11 And, of course, this is critical because even as
12 your Honor pointed out while we're talking about maybe a few
13 weeks where there may not be a stay we, the debtors, are not
14 in a position to adequately protect the interests of
15 USA Commercial Mortgage, Diversified, and First Trust Deed
16 at this point in time.

17 But Compass when they take over, you know, who is
18 well-funded and in a different position would be able to and
19 should be given the time to adequately protect its own and
20 the other direct lenders' interests in this situation.

21 The Texas Court based on a single-asset real estate
22 designation -- so there are those special rules that allow
23 relief from the stay -- has allowed this matter to be
24 noticed up for foreclosure.

25 My understanding is that it's being heard today on a

1 final hearing as to whether that would be allowed to go
2 forward on February 6th.

3 Now, we, the debtors, gave notice to Western United as
4 early as August 15th of the stay and have again reminded
5 them that the stay is in effect, so there is no emergency
6 meaning they could have sought relief from stay for months
7 and months if they had wanted to.

8 They did not seek relief from the stay. They just went
9 forward and proceeded forcing us now to come in then to ask
10 for the stay to be enforced.

11 There is no question that under Ninth Circuit law,
12 your Honor, that junior liens are property of the estate.
13 They are protected by the stay, and, therefore, they are not
14 entitled to foreclose out those properties or those
15 interests absent getting relief from the stay.

16 I think as your Honor is aware that the Bibb case of
17 the Ninth Circuit BAP which actually interpreted the Bialac
18 case which is a Ninth Circuit case itself in interpreting
19 that property of the estate is being very broad.

20 And the Bibb case in looking at the reasoning of the
21 Ninth Circuit Bialac case said junior liens are definitely
22 property of the estate. They are protected by the stay.

23 That was confirmed in the Cogar case and, most
24 recently, in the A Partners case in the Eastern District of
25 California, so this is the law in this circuit.

1 And while there may be other circuits that decide
2 differently, this Court is bound by our own circuit's law
3 and not by the law of other circuits.

4 We have asked the Court, you know, for an order
5 enforcing the stay. If they want to seek relief from stay,
6 they need to do so.

7 But we are entitled to have that hearing and the
8 protections that the stay allows us to be able to have this
9 Court determine whether relief from the stay is appropriate
10 and not just allow them to go forward and try to effect and
11 foreclose out our interests.

12 THE COURT: Okay.

13 MS. JARVIS: So we would ask the Court to enforce
14 the stay.

15 MS. CARLYON: Your Honor, as First Trust Deed Fund
16 is a named lender on the second deed of trust, we also filed
17 a joinder in the debtor's motion to enforce.

18 As far as the procedure going forward, I don't know if
19 a preliminary and final hearing is appropriate since this is
20 a motion to enforce the stay.

21 But it may be appropriate if we needed to set a
22 continued hearing, especially, given the number of matters
23 we have on calendar today simply on the issue of whether the
24 postpetition notice of sale which was filed by this creditor
25 knowing that this bankruptcy estate had an interest in the

1 second itself violated the stay and is, therefore, a void
2 act because it seems to me that unless the creditor agrees
3 that it's going to repost that notice following the stay
4 lifting in this case that issue does remain squarely in
5 play.

6 THE COURT: Okay. All right. Opposition.

7 THE CLERK: Could you spell your last name for me?

8 MR. ANGLIN: Yes. A-n -- excuse me. A-n-g-l-i-n.

9 Your Honor, obviously, this is a fairly interesting
10 question I think, and I have never seen in 31 years of
11 practicing bankruptcy law this particular question brought
12 to a Court.

13 THE COURT: Well, I just --

14 MR. ANGLIN: And --

15 THE COURT: -- thought it was the law in the
16 Ninth Circuit. I just thought there was no question that
17 the Bibb and Bialac case said if there was a -- no. As to
18 USA Commercial Mortgage, that's a little tangential. But as
19 to the two funds, they have an interest in the deed of
20 trust.

21 MR. ANGLIN: That's right, your Honor, but the --

22 THE COURT: So why aren't they protected by the
23 stay? It's property of the estate.

24 MR. ANGLIN: It's a question of 362 and a question
25 of 541. In the United States Supreme Court in Whiting

1 Pools, it tells us that lien interests are not property of
2 the estate, but no date.

3 THE COURT: Well, that's a footnote. That
4 wasn't --

5 MR. ANGLIN: That's true. It wasn't. It was
6 dicta, but it was an interesting explanation for why the
7 Supreme Court thought that a debtor's lien interest if it
8 was a junior lien interest in property of a third party was
9 not --

10 THE COURT: Why didn't you just bring a motion for
11 relief from the stay?

12 MR. ANGLIN: Well, your Honor, in the
13 Fifth Circuit, that would never be done. In the Fourth and
14 Seventh Circuits, that would never be done.

15 THE COURT: Well, that's great, but you're not in
16 the Fifth or Fourth Circuits.

17 MR. ANGLIN: So wouldn't it be important, then, to
18 understand why -- Bibb and Bialac and A Partners, what were
19 those Courts driving at?

20 And is there any difference between those decisions
21 which may warrant such a decision in the Ninth Circuit not
22 be an appropriate decision when the property is located
23 outside the Ninth Circuit or say outside of California?
24 Foreclosure laws are state laws.

25 THE COURT: I mean, what if, for example, you had

1 a deed of trust that was owed \$1. Okay?

2 MR. ANGLIN: Okay.

3 THE COURT: The property was worth \$5,000,000, and
4 you had a debtor that owned 90 percent of a second.

5 MR. ANGLIN: Your Honor, in Texas --

6 THE COURT: Under your theory, they're not
7 protected by the stay.

8 MR. ANGLIN: Your Honor, in Texas, that debtor
9 would show up at the foreclosure and bid \$2 and own the
10 property.

11 THE COURT: But where do they get the money to do
12 that? They'd have to borrow.

13 MR. ANGLIN: Well, your Honor, I'm just saying
14 that in Texas the second lienholders have no rights like
15 they do in California that prompted the Bibb and Bialac
16 decisions and A Partners. Even in the words lifted from the
17 cases and put in --

18 THE COURT: Well, the Ninth Circuit, the same
19 thing happens. The second can bid at the sale.

20 MR. ANGLIN: That's true. They also have the
21 right of redemption and reinstatement, but those rights are
22 not existent in Texas.

23 THE COURT: No. There is no right of redemption
24 and reinstatement in California or Nevada.

25 MR. ANGLIN: Well, the cases that were quoted and

1 the language planted into the motion that we're hearing
2 today says that it is. It highlights the redemption and
3 reinstatement rights.

4 In fact, the fears of those Courts were that the rights
5 of redemption and reinstatement were what were being taken
6 away, in other words, the package of rights associated with
7 the junior lien interest that was being taken away by the
8 foreclosure. Those rights that they were concerned about in
9 those cases --

10 THE COURT: How --

11 MR. ANGLIN: -- literally --

12 THE COURT: I don't --

13 MR. ANGLIN: -- don't exist --

14 THE COURT: -- understand --

15 MR. ANGLIN: -- in Texas.

16 THE COURT: -- how in the world you can say a
17 junior lien interest isn't property of the estate. How in
18 the world can you possibly say that? You can certainly
19 borrow on it, right?

20 MR. ANGLIN: You can -- excuse me?

21 THE COURT: Borrow on it. For example, if I have
22 a two-percent interest in a second deed of trust, I can take
23 that to some lender and get money on it, right --

24 MR. ANGLIN: You would be --

25 THE COURT: -- if it's worth anything?

1 MR. ANGLIN: You would be --

2 THE COURT: It's a property interest.

3 MR. ANGLIN: You would be pledging the note --

4 THE COURT: Right.

5 MR. ANGLIN: -- your Honor.

6 THE COURT: Right.

7 MR. ANGLIN: There's no doubt that the note itself
8 is property of this estate --

9 THE COURT: Right.

10 MR. ANGLIN: -- and that that lien position that's
11 granted to secure that note has rights associated with it
12 which it could also be property rights of the estate. I'm
13 not arguing that it's not.

14 What I'm saying is that we are not foreclosing on the
15 note, and we're not frustrating or in any way impinging upon
16 the rights associated with --

17 THE COURT: If you foreclose --

18 MR. ANGLIN: -- that note.

19 THE COURT: -- the second's wiped out, correct?

20 MR. ANGLIN: That's by state law. That's not --

21 THE COURT: Okay. So it's wiped out.

22 MR. ANGLIN: Yes. It is --

23 THE COURT: The property interest --

24 MR. ANGLIN: -- wiped out.

25 THE COURT: -- is gone.

1 MR. ANGLIN: That is strictly foreclosed.

2 THE COURT: Okay.

3 MR. ANGLIN: So the --

4 THE COURT: So how can you tell me you're not
5 wiping out a property interest?

6 MR. ANGLIN: Because what we're doing is we're
7 simply using our right that Judge Clark in Houston I assume
8 today will say that we can go forward with to take legal
9 title to the property, to take legal and equitable title to
10 the property, if we are the --

11 THE COURT: Well, but the issues of fact --

12 MR. ANGLIN: -- successful bidder.

13 THE COURT: The issues are different in front of
14 him. The issue is as between you and the debtor is there
15 adequate protection like -- well, what's the property worth?

16 MR. ANGLIN: We don't know.

17 THE COURT: How can you --

18 MR. ANGLIN: It's been --

19 THE COURT: How can you file your motion and not
20 know?

21 MR. ANGLIN: File a motion to --

22 THE COURT: And in --

23 MR. ANGLIN: -- lift the stay?

24 THE COURT: And in front of Judge Clark.

25 MR. ANGLIN: Well, there has been -- well, we did

1 it because --

2 THE COURT: Oh, because it's under --

3 MR. ANGLIN: -- it's a single asset --

4 THE COURT: -- the single-asset --

5 MR. ANGLIN: -- a single-asset --

6 THE COURT: -- real estate.

7 MR. ANGLIN: -- real estate.

8 THE COURT: Okay.

9 MR. ANGLIN: We have been delinquent for
10 two-and-a-half years. We have not received a single
11 payment. Judge Clark is tired of it. We are tired of it,
12 and the time has come --

13 THE COURT: But the issues --

14 MR. ANGLIN: -- to foreclose.

15 THE COURT: -- are totally different. The issue
16 is as between you and the first can you foreclose, right?

17 MR. ANGLIN: You're right.

18 THE COURT: Okay.

19 MR. ANGLIN: Well, and these debtors actually came
20 to Houston and asked for the --

21 THE COURT: I mean --

22 MR. ANGLIN: -- very same --

23 THE COURT: Excuse me. You and the owners.

24 Excuse me. The debtor in bankruptcy there is the owner,
25 right?

1 MR. ANGLIN: The debtor is the owner.

2 THE COURT: Right. Because the --

3 MR. ANGLIN: Yes.

4 THE COURT: Between you as the first and the
5 owner, those are the issues.

6 MR. ANGLIN: That's right.

7 THE COURT: Okay. So he's not determining whether
8 or not there's any rights in the property as to the
9 second --

10 MR. ANGLIN: Well --

11 THE COURT: -- nor can he.

12 MR. ANGLIN: Judge Letitia Clark, she was asked by
13 USA, the First and Diversified, to make that determination,
14 your Honor.

15 They sent lawyers to Houston to argue that in front of
16 her, and she did not give credence to that argument and did
17 not enforce the stay as they requested, so they came here.

18 (Colloquy not on the record.)

19 THE COURT: But you never filed a motion to lift
20 stay.

21 MR. ANGLIN: In this court, we have not,
22 your Honor.

23 THE COURT: Okay.

24 MR. ANGLIN: It was our understanding that no stay
25 existed to frustrate the first lienholder's foreclosure --

1 THE COURT: Why in the world --

2 MR. ANGLIN: -- just as the Fourth is --

3 THE COURT: -- would you want to do that when you
4 know the law in the Ninth Circuit is a sale conducted in
5 violation of a stay is void?

6 MR. ANGLIN: Well, the law in the Ninth Circuit if
7 it's the Bibb case, it's a vacated --

8 THE COURT: No.

9 MR. ANGLIN: -- decision --

10 THE COURT: The other cases --

11 MR. ANGLIN: -- of the BAP.

12 THE COURT: -- that say that acts conducted in
13 violation of the stay are void.

14 MR. ANGLIN: Well, that's true. We wouldn't want
15 to have -- if we thought that it was in violation of the
16 stay, we would not foreclose.

17 THE COURT: But why risk it?

18 MR. ANGLIN: Well, that's what I guess the purpose
19 of this hearing is. If the stay is in place, and this Court
20 declares that until the note is sold, then we will not
21 foreclose.

22 THE COURT: Well, we still don't know. Did you
23 intend to republish?

24 MR. ANGLIN: Well, in Texas, you can only
25 foreclose on the first Tuesday of a month. We would have

1 missed the February 6th opportunity, so we would be required
2 to repost, anyway, in February for any March foreclosure.

3 THE COURT: Okay.

4 MR. ANGLIN: If the Court would grant us this
5 because of the pending sale and because of the extraordinary
6 circumstances, the fact that this may be over very shortly,
7 we would ask the Court to at least permit us to post in
8 February for a March foreclosure subject to the stay being
9 clearly lifted and permitting a March foreclosure.

10 THE COURT: Okay.

11 MR. ANGLIN: Would that be acceptable to the Court
12 or --

13 THE COURT: If you had stipulated with counsel,
14 that might have been the answer, but it's too late now.

15 MR. ANGLIN: Okay. Thank you, your Honor.

16 THE COURT: Okay. I'm going to grant the debtor's
17 motion. I believe that the Ninth Circuit law is clear that
18 the junior lien held by the funds is property of the estate.
19 And, therefore, in order to foreclose on that interest, they
20 had to file a motion for relief from the stay.

21 Now, it probably wouldn't have been a hard case to do
22 since there's such a minor interest held by them and
23 depending upon the values, but they didn't do it. They
24 didn't follow the rules.

25 I won't make a decision as to whether or not

1 USA Commercial has property of the estate. That seems a
2 little more tangential to me, the right to exit fees. I
3 won't go that far. But as to the two funds, it is property
4 of the estate.

5 I don't make any -- well, I find that it's property of
6 the estate. So whether or not they can now proceed even
7 when the -- what the effect of the prior notice was, I don't
8 rule on. Okay.

9 Thank you.

10 (Thereupon, the portion requested to be transcribed
11 was concluded at 11:37:45 a.m.)
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1 I certify that the foregoing is a correct transcript
2 from the electronic sound recording of the proceedings in
3 the above-entitled matter.

4
5
6 /s/ Lisa L. Cline

03/18/07

7 Lisa L. Cline, Transcriptionist

Date